

AUG 27 1977

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

77-304 Term, 1977

No. _____

Paul Richter, dba The Body Shop,

Petitioners,

vs.

Baxter Rice, Director of The Department of Alcoholic Beverage Control of the State of California, The Department of Alcoholic Beverage Control of the State of California, and The Alcoholic Beverage Control Appeals Board of the State of California,

Respondents.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
ALCOHOLIC BEVERAGE CONTROL APPEALS
BOARD OF THE STATE OF CALIFORNIA

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of Counsel

SUBJECT INDEX

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APPENDIX "A", Opinion of the
Alcoholic Beverage Control Appeals
Board

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Pursuant to the request of the Court,

Petitioner herewith submits a revised

Appendix "A" in compliance with Supreme

Court Rule 39.

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the) AB-4350
Accusation Against) File 24157; Reg. 5216
) ALJ: Gruen
PAUL A. RICHTER)
dba The Body Shop) Date and Place of Hear-
3776 Riley Street) ing: January 26, 1977
San Diego) 314 West First Street
) Los Angeles, Califor-
Respondent and Licensee) nia
)
On-sale general license) For Department:
) Honorable Evelle J.
Under the Alcoholic Beverage) Younger, Attorney
Control Act.) General, Marilyn Mayer
) Deputy Attorney General
)
) For Appellant:
) Joshua Kaplan, Esq.

Appellant Paul A. Richter, doing business as The Body Shop, has appealed a decision of the Department of Alcoholic Beverage Control which determined:

"1. The Department's motion to dismiss Counts II, III, IV and VI of the Accusation and to amend licensee's previous record to show 'finality' of decision relative to Accusation 43, 4-10-74 and Accusation 18386, 7-30-73, should be granted.

"2. Exhibit A (reporter's partial transcript in file 32772; Reg. 43) is admitted into evidence.

"3. Article XX, Section 22 of the California Constitution and Sections 24200(a) and (b) of the Business and Professions Code are not unconstitutional and there is no violation found of the First and Fourteenth Amendments to the United States Constitution.

"4. Section 143.3(1)(c), California Administrative Code was not unconstitutional found above, and there is no violation found of the First and Fourteenth Amendments to the United States Constitution.

"5. It was not established that there existed conspiratorial motives or bad faith on the part of enforcement officials whereby respondent and others similarly situated were subjected to selective and arbitrary enforcement of the law.

"6. Respondent violated Section 143.3(1)(c), California Administrative Code as to Counts I through IV of the findings of fact above. Grounds for disciplinary action against respondent's license have been established pursuant to Sections 24200(a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution."

As a penalty the department revoked respondent's license as to each of Counts I through IV of the decision.

The department's decision further provides:

"A. Ruling on Notice of Special Defense: All of the special defenses and any motion contained therein, are

each overruled and denied.

"B. Pursuant to stipulation the matter was heard in Los Angeles, California.

"C. The Department moved to dismiss Counts II, III, IV and 71 of the Accusation, and moved to amend licensee's previous record to show the decision was final relative to Accusation 43, 4-10-74 and Accusation 18386, 7-30-73.

"D. The matter was submitted subject to the right of the parties to submit briefs and points and authorities. Respondent's briefs and points and authorities were filed on July 14, 1976. The Department filed its brief and points and authorities on July 30, 1976.

"Pursuant to stipulation of the parties, the Administrative Law Judge makes the findings of fact, as follows:

"FINDINGS OF FACT:

"COUNT I

"On or about October 9, 1975, the above-named on-sale licensee did permit Denise LaMont to perform acts in the above-designated on-sale licensed premises at which time said Denise LaMont did display her pubic hair.

"COUNT II

"On or about November 8, 1975, the above-named on-sale licensee did permit Donna Diane Millard and Linda Sue Spring to perform acts in the above-designated on-sale licensed premises at which time

said Donna Diane Millard and Linda Sue Spring did display their pubic hair.

"COUNT III

"On or about November 21, 1975, the above-named on-sale licensee did permit females known only as Felicia and Donna to perform acts in the above-designated on-sale licensed premises at which time said females known only as Felicia and Donna did display their pubic hair.

"COUNT IV

"On or about March 16, 1976, the above-named on-sale licensee did permit Sherry Duke and Ruth Rae Bridwell to perform acts in the above-designated on-sale licensed premises at which time said Sherry Duke and Ruth Rae Bridwell did display their pubic hair.

"SPECIAL FINDINGS:

"It was stipulated by the parties that the reporter's partial transcript be identified and received in evidence as Exhibit A and that testimony contained therein be received as if the witness were called, sworn and testified at the herein hearing subject to the same objections of record contained in said Exhibit A.

"LICENSEE PREVIOUS RECORD:

"Paul A. Richter type '48' licensed as individual at above premises since 11-17-75 with no disciplinary action.

"Paul A. Richter, President and sole stockholder of Paul Richter &

Associates, Inc., type '48' licensed at above premises from 1-31-68 to 11-17-75 with the following:

"Accusation 43, 4-10-74, Rule 143.3 (1) (c) - 11 counts, Rule 143.3(1) (b) & (c) 1 count, & Rule 143.3(2) - 1 count, Decision: 45 days/fifteen stayed, Appeals decided adverse to respondent. Decision final.

"Accusation 18981, 11-12-73, Rule 143.3(1) (c) - 22 counts, Rule 143.2(1) - 1 count, Rule 143.3(2) - 2 counts, and Rule 143.3(2) -- 12 counts, Decision of 11-28-75: 30 days/ 10 stayed; appealed, pending.

"Accusation 18386, 7-30-73, Rule 143.3(1) (c) - 20 counts, Rule 143.3(2) - 1 count, Decision of 3-21-74, thirty days/ ten stayed, Appealed, 3-4-76 (sic). All appeals resolved adverse to respondent. Decision final.

"Accusation 7562, 2-21-69, 24200 a B & P Sec. 22, Art. XX, State Constitution; 11-17-71 ten days/five stayed (imposition of penalty stayed pending U.S. Supreme Court Decision in the LaRue case); POIC (\$771.63) Accepted on 8-6-73 in lieu of ten days/five stayed.

"Accusation 11791, 11-24-70, 2568a & b & 25665, 3-1-71 fifteen days/ten stayed, eff. 6-24-71 (posted).

"Accusation 12043, 1-8-71, 25665 & 25663: 4-1-71 twenty-five days/fifteen stayed, POIC (\$1,108.60) accepted in lieu on 6-17-71.

"Paul A. Richter type '40' licensed at above premises as individual from 2-14-66 to 3-17-67; type '48' licensed at above premises as individual from 2-16-67 to 1-31-68, with the following:

"Type '48' licensed:

"Accusation 3415, 4-20-67, 25658 a & b & 25665; 4-20-67 five days, POIC (\$250) in lieu on 6-2-67.

"Accusation 4001, 1-27-67, 25658 a & b & 25665, 8-24-67 fifteen days/ ten stayed, POIC accepted on 11-17-67 (five days); and reimposition of ten days stayed for POIC \$1,543.26) accepted on 8-6-73.

"Accusation 4947, 12-26-67, 25632, 6-8-70, ten days, POIC (\$1,408.80) accepted on 7-8-70."

Appellant appeals under Business and Professions Code section 23084, subsections (a), (b), (c) and (d).

The department dismissed Counts II, III, IV and VI of the accusation at the hearing. The Attorneys for the department and respondent stipulated as to the truth of Counts I, V, VII and VIII of the accusation (Counts I, II, III and IV of the department's decision). They also stipulated that a partial transcript of the testimony of one Virginia Chase, In Case No. L-6576, be

received into evidence as if Ms. Chase had testified at the instant hearing (Respondent's Exhibit A), with the objections thereto also in full force and effect, to be ruled upon by the Administrative Law Judge presiding over the instant department hearing regardless of prior rulings.

Ms. Chase had testified as an expert witness with regard to the definition of a "dance" and related matters in the previous department hearing.

Appellant filed a petition with the appeals board to suspend this proceeding before the appeals board pending the outcome of a hearing scheduled by the department relative to whether section 143.3 of the California Administrative Code,¹

1/ Section 143.3 states in pertinent part: "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:"

* * *

"(c) The displaying of the pubic hair, anus, vulva or genitals."

should be repealed or amended, and pending an action filed by the appellant in the United States Ninth Circuit Court of Appeals, entitled Richter v. The Dept. of Alcoholic Bev. Control. (Case No. 76-2422).

With regard to the stay requested by appellant due to the aforementioned hearing by the department, we find said request devoid of merit. There is no evidence in the record that a repeal of section 143.3 is pending nor imminent. Moreover, repeal of said rule would not necessarily affect violations occurring prior thereto.

With regard to appellant's request for a stay of these proceedings due to his appeal to the United States District Court of Appeal for the Ninth Circuit, supra, Business and Professions Code section 23084(e) and Article XX, section 22 of the California Constitution, cited by appellant, permit a remand (not a suspension) only and this is only when relevant evidence could not have been produced, or was excluded, at the department hearing. Appellant has shown no relevant evidence

which was not considered by the department. The appeals board is not aware of any legal authority to suspend a proceeding before it on appeal. A matter is stayed by law while being considered by this board and during the time that an application may be made for a Writ of Review to the appellate courts (Business and Professions Code section 23090.7); hence, granting such a stay would be a redundant act. Finally, in People v. Green, 66 Cal.App.3d 801, the court stated:

California courts also have recognized that a federal district court cannot impose a duty to act upon any state court and that a state court acts independently and voluntarily in responding to the federal order. (See People v. Pasanella (1971) 14 Cal.App.3d 1004 [92 Cal.Rptr. 655]; People v. Hamilton (1975) 80 Cal.App.3d 476 [123 Cal.Rptr. 390])" (People v. Green, 66 Cal.App.3d 801, at p. 804).

Upon appeal appellant contends: the enforcement of section 143.3 against him would amount to a deprivation of rights guaranteed under the First and Fourteenth amendments to the Constitution of the United States in at least three respects:

(1) that section 143.3 cannot, consistent with the

guarantees of the First Amendment, apply to forbid dance performances in a neighborhood theater absent gross sexuality on the facts of the particular application, (2) that it is inconsistent with the due process guarantee of the Fourteenth Amendment read in light of the First Amendment context in this action, for the determination of gross sexuality to be made by any other than a judicial tribunal in the first instance, and (3) that the procedure herein, by not guaranteeing applicant judicial review of the department's decision as a matter of right, fails to afford appellant minimum due process, and violates Article XX, section 22 of the Constitution of the State of California; and, appellant further submits that the drastic remedy herein sought, revocation of his license, is so excessive and abusive in relation to the conduct at issue to be beyond the department's administrative discretion.

Appellant's contention that since gross sexuality was not proven as to the dance performances, section 143.3 constitutes a violation

of the First Amendment as applied to the specific violations herein, is devoid of merit. The violations stipulated to specifically indicate the licensee of the subject premises simply permitted individual females to display their pubic hair. The testimony in Respondent's Exhibit A did not pertain to the acts on the dates in question. However, assuming arguendo the exposures herein in some manner partook of communication, we find appellant's "gross sexuality" argument to be unpersuasive in view of the reaffirmation of the simple nudity test of California v. LaRue, (1972), 409 U.S. 109 [93 S. Ct. 390], In Doran v. Salem Inn, Inc., (1975) 95 S.Ct. 2561. In Doran the United States Supreme Court stated:

"Although the customary 'bar room' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. La Rue, 409 U.S. 109, 118, 93 S.Ct. 397, 34 L.Ed.2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In La Rue, however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude

dancing and that a state could therefore ban such dancing as part of its liquor license program."
(Emphasis ours, p.2568.)

(The Doran Court went on to conclude, that the statute being considered therein was unconstitutional because it went beyond licensed premises in its application.)

Appellant's contention that the instant procedure amounts to an unconstitutional prior restraint on appellant's constitutional right of free expression under the First and Fourteenth Amendments, is devoid of merit (California v. LaRue, supra, 409 U.S. 109 [93 S.Ct. 390] and Doran v. Salem Inn, Inc., supra, 95 S.Ct. 2561). There was no injunction applied by the department prior to its hearing regarding the instant accusation under section 143.3, a fortiori, the licensee was and is allowed to proceed with his alleged communicative acts without any prior restraint thereon. Moreover, as heretofore indicated, the department is not allowed to enforce its decision during the pendency of an appeal with the Alcoholic Beverage Control Appeals Board and during the time

appellant may file a Writ of Review with the District Court of Appeal or Supreme Court after the Appeals Board's decision (Business and Professions Code section 23090.7). Clark v. The City of Fremont, Nebraska, 377 F.Sup. 327, is not applicable because it misinterprets the decision of LaRue to mean that a finding upon gross sexuality is required in licensed premises. As stated in Doran v. Salem Inn, Inc., supra, gross sexuality is not the test that is required in LaRue; mere nudity in a licensed premises is sufficient.

Appellant's contention that the instant procedure fails to afford him a meaningful opportunity to be heard and denied him due process of law, is devoid of merit. This is not a situation as the court was faced with in Misurelli v. City of Racine, 346 F.Sup. 43, where the liquor license might expire prior to a final determination of the denial of the liquor license's renewal; and, that the only grounds for reversal of the liquor license denial would be if the municipality decision had been found to be arbitrary, capricious or discriminatory. Under Business and Professions Code

section 23090.2, a court on review (as did this board) may consider whether: the department has proceeded without or in excess of its jurisdiction; the department has proceeded in the manner required by law; the decision of the department is supported by the findings; the findings in the department's decision are supported by substantial evidence in the light of the whole record; and, there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department. Moreover, any person affected by a final order of the appeals board, may, under Business and Professions Code section 23090, apply to the Court of Appeal or the Supreme Court for a Writ of review of said final order within thirty days after the filing of said final order. Under Business and Professions Code section 23090.7, no decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which a petition may be made for such a Writ of Review;

and, under Business and Professions Code section 23090.6, the court before which the Petition for Writ of Review is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department.

Appellant's contention that Article XX, section 22 of the California Constitution has been violated by a change in the law which removes the right for judicial review of appeals board decisions in all cases, is devoid of merit. The subject Constitutional provision states: "Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order." (emphasis added.) It does not state: "Orders shall be reviewed." Since the appellant has the ability to appeal the board's decision to the courts of appeal of the State of California under Business and Professions Code section 23090, with the concomitant right to have the decision stayed upon said appeal, the provision in Article XX, section 22 has been appropriately provided for by statutory law.

(Also see: Francisco Enterprises, Inc., v. Kirby, 482 F.2d 481, which concludes that the department is a state court of limited jurisdiction.)

Appellant's contention that the penalty of revocation lies beyond the legal boundaries of the department's regulatory discretion under these facts, is devoid of merit. Many of the previous violations of appellant have become final. Walsh v. Kirby, 13 Cal.3d 95, cited by appellant, indicates that in a fair trade matter the department must serve an accusation on a licensee prior to the date of a subsequent violation, in order to be permitted to file a subsequent accusation based upon said subsequent violation; no final decision is required before the subsequent accusation can be filed, however. Walsh does not concern situations, such as this, involving an habitual violator. The department is given broad discretion as to the imposition of a penalty (Cadilla v. Bd. of Medical Examiners, 26 Cal.App.3d 961; Lake v. Civil Service Commission, 47 Cal.App.3d 224). Since the record demonstrates appellant is an habitual offender as to the rule involved and unwilling to conform

(Dave's Market, Inc. v. Dept. of Alcoholic Bev. Control, 222 Cal.App.2d 671 [35 Cal. Rptr. 348]), we cannot say imposition of the penalty of revocation in this case constitutes an abuse of discretion as a matter of law. (See Martin v. Alcoholic Bev. Control Appeals Bd. & Haley, 52 Cal.2d 287 [341 P.2d 296].) As discussed, supra, this decision of the department, is "subject to" judicial review.

There is no merit to the issues raised upon appeal. The evidence supports the findings, and the findings support the department's decision, which is affirmed.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Patricia Wilkey
Eugene V. Lipp

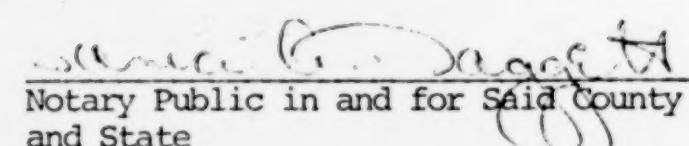
AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, ANDREA F. JACKSON, depose and say:
That I re-typed the Opinion of the Alcoholic Beverage Control Appeals Board, which is attached hereto as Appendix "A" to the Petition for Writ of Certiorari, from a true and correct copy thereof; that I certify that this is a true and accurate reproduction of said Opinion.


ANDREA F. JACKSON

Subscribed and sworn to before me
this 25th day of August, 1977.


Notary Public in and for Said County
and State



PROOF OF SERVICE BY MAIL

(1013, 1013a C.C.P. (2), 2015.5 (C.C.P.))

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY

MAIL BY ATTORNEY

I, JOSHUA KAPLAN, being first duly sworn, say:

That I am and was at all times herein mentioned, a citizen of the United States, employed in the County aforesaid, and over the age of eighteen years; I further say that I am an active member of the State Bar of California, a member of Hertzberg, Kaplan & Koslow, attorneys of record in this case, and am not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

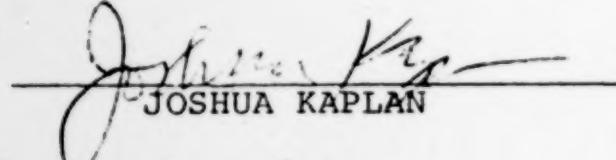
That on August 25, 1977, I served the within SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE

OF CALIFORNIA on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California 90010 addressed as follows:

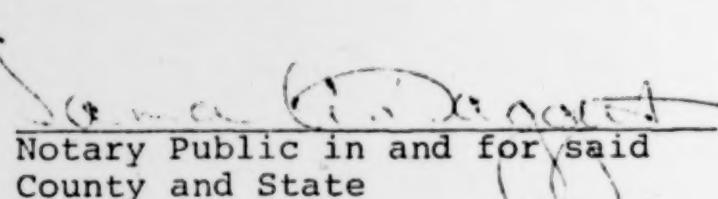
Attorney General Evelle J. Younger
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110 West "A" Street, Suite 600
San Diego, California 92101

State Supreme Court
3580 Wilshire Boulevard
Los Angeles, California 90010

Court of Appeal,
Fourth Appellate District
6010 State Building
1350 Front Street
San Diego, California 92101


JOSHUA KAPLAN

Subscribed and sworn to before me this 25th day of August, 1977.


Notary Public in and for said County and State

